No. 98-10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

JEFFERSON COUNTY, ALABAMA,
Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT U.W. CLEMON IN OPPOSITION

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> Common sense whispers to me that this is the classic tempest in a teapot involving more the clash of powerful egos rather than powerful principles. The outcome of this issue may dent the coffers of Jefferson County or a few federal judges but will speak little to the separation-of-powers principle used to justify this considerable expenditure of public resources.
> Pet.App. 67 n.3.

Those words, from the dissenting opinion of Judge Birch on the first rehearing en banc in the Eleventh Circuit, were on the mark then and are even more true today. In the interim, petitioner has sought review in this Court on the merits, and this

Court summarily vacated and remanded on an issue that no one, not even the United States as an *amicus*, had raised. Twelve judges of the Eleventh Circuit reassembled again en banc and issued another lengthy opinion, with three dissents, and again Jefferson County is seeking review in this Court over a sum of money that does not exceed $668 per judge per year. As Judge Birch also observed, "[i]t is indeed sobering to reflect upon the expenditure of taxpayers' dollars in the resolution of the issue before this court [including the] legal fees and time expended by Jefferson County [and] the expenditure of federal judicial resources ... ." *Id.* More importantly, neither of the issues presented in the petition has any significance beyond Jefferson County and perhaps three cities in Alabama or is for any other reason worthy of this Court's review. Accordingly, for these reasons and others set forth below, the petition should be denied.

STATEMENT OF THE CASE

1. Factual and Statutory Background

This case began with the filing of two separate complaints in the Small Claims Division of the District Court for the Tenth Judicial Circuit for the State of Alabama in Jefferson County on December 29 and December 31, 1992. In these actions, petitioner Jefferson County sought to recover amounts that it claimed were owed by respondents for "license fees," plus interest and penalties, assessed by the County for the privilege of engaging in their occupation as United States District Judges for the Northern District of Alabama in Jefferson County. As judicial officers of the United States, respondents' defense was that the licensing system violated the United States Constitution because it interfered with carrying out their official judicial functions and because it diminished their compensation in violation of Article III. Accordingly, they removed the cases to

the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1442(a)(3), where the cases were consolidated before Senior District Judge Charles A. Moye of the Northern District of Georgia, sitting by designation.

The statutory basis for petitioner's claims is Jefferson County Ordinance No. 1120 of 1987, enacted after both respondents had been appointed to their judicial offices. Pet. App. 129-39. Under Alabama law, cities and counties have no authority to impose an income tax (*id.* at 84 n.2), but they are permitted by Alabama Act 406, approved September 7, 1967, to enact "a privilege, license, or occupational tax" for those persons who are not otherwise required by Alabama law to be licensed by the State. Pet. App. 126-28. Under Ordinance 1120, which specifically includes all federal and state officials, the amount of the tax is one half of one percent of the gross receipts or compensation earned by the licensee for services performed in Jefferson County. Respondents and four other active judges in the Northern District of Alabama sit in Birmingham, which is in Jefferson County. However, these judges also sit from time to time in the six other Divisions in the Northern District, which, in the case of respondent Clemon, results in approximately one-third of his time being spent outside Jefferson County. With the salaries for District Judges at $133,600, 28 U.S.C. §§ 135, 461 (1994 & Supp. 1998), the amount at issue per judge can be no more than $668 and is almost certainly less for at least some judges.

There are a vast number of exemptions to Ordinance 1120 (Pet. App. 143-75), but the most significant one for these purposes is enjoyed by members of the Alabama Bar. Instead of paying a "license fee" of one half of one percent of their gross receipts to Jefferson County, lawyers working there pay bar dues of only $250 per year, no matter how much they earn.

Several features of the Ordinance are of significance. First, section 2 provides that it "shall be unlawful for any person

to engage in or to follow any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession." If a licensee works both inside and outside the County, section 3 requires an apportionment to be made by the licensee's employer or the licensee. Section 4 requires the employer to withhold the amounts due, and section 7 gives the Director of Revenue the authority to audit the books and records of the employer and employee to determine whether the proper fee is being paid. Finally, under section 10(B), if a person "shall fail, neglect or refuse to pay a license fee as by this Ordinance required," such person "shall upon conviction be subject to punishment within the limits of and as provided by law for each such offense." No federal judge has ever been charged under section 10(B), and no entity of the federal government, including the Administrative Office of the United States Courts, has ever withheld the amounts due by respondents or any other federal judge, nor filed any declarations required by Ordinance 1120.

Respondents recognize that they are obligated to pay, and do in fact pay, income taxes to the State of Alabama, provided that they are not imposed on a discriminatory basis. Their objection to the tax here is that it is not an income tax under either Alabama or federal law, but is instead, as the Ordinance itself proclaims, a license fee based on income, assessed by petitioner on respondents for the privilege of being a federal judge. Because that is an imposition made on a federal function, the doctrine of inter-governmental immunity precludes petitioner from imposing such a requirement on respondents whose "license" to be federal judges comes from the United States, not Jefferson County. In addition, as a license fee, it is also an unconstitutional diminishment of their salaries, in violation of Article III of the Constitution, particularly since it was imposed for the first time after they had become federal judges.

2. Prior Proceedings

After the district court denied petitioner's motion to remand based on the claim that the federal courts were barred from hearing this action by the Tax Injunction Act, 28 U.S.C. § 1341, the case proceeded on cross-motions for summary judgment, including a stipulation of facts. Judge Moye carefully analyzed the Ordinance and agreed with respondents that it was an unconstitutional tax on a federal function and that it unconstitutionally diminished their salaries. Pet. App. 82-111.

Petitioner appealed to the Eleventh Circuit, raising only issues on the merits. A divided panel reversed in an opinion written by Judge Birch. In the view of the majority, the license fee was an income tax imposed on respondents, and as such it was entirely lawful. Chief Judge Tjoflat dissented, agreeing with the district court that the Ordinance was unconstitutional on both grounds urged.

Respondents were then granted rehearing en banc, and the full court, by a vote of 9-3, reversed the panel and sustained respondents' claim that the Ordinance imposed an unconstitutional direct tax on the exercise of the federal function of being an Article III judge. In the course of a thorough review of both constitutional doctrine and the statutes cited by petitioner to support its claim that the United States had consented to the imposition of this tax, the majority opinion, written by Judge Cox, focused on the substance of what the Ordinance did, and not on the labels attached to it. As the majority concluded, petitioner was "taxing a federal judge in the performance of his or her duties [which] is fundamentally different from taxing his or her income." Pet. App. 49. They based their conclusion on both Alabama law and their own view of the operation of the statute, principally the portion which, in addition to imposing a tax, also made it "unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax." *Id.* at 51. In reaching their

conclusion, the majority stated that they had "no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties [and] that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to lawfully perform his or her duties." *Id.* at 51-52.

The court also considered and rejected petitioner's contentions that the Public Salary Tax Act, 4 U.S.C. § 111, and the Buck Act, 4 U.S.C. § 106(a), amounted to consents to impose the taxes here. As for the former, the majority reasoned that, while "Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees, [Congress did] not consent to all state taxes on federal employees," in particular those "state taxes that in substance are not taxes on income." *Id.* at 56. With respect to the Buck Act, it correctly noted that "the Buck Act merely precludes a taxpayer from arguing that a state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area," contentions that respondents have never made. *Id.* at 58, 60. In light of its conclusion that Congress did not consent to these taxes, the court found it unnecessary to reach the issue of whether Article III would forbid it from doing so, as the district court had concluded. *Id.* at 35.

Judges Birch and Henderson, who had comprised the majority of the panel, dissented, joined by Judge Anderson. *Id.* at 63-74. Their principal disagreement was over the proper characterization of the operation and effect of the Ordinance, which they believed were indistinguishable from those of an income tax which everyone agreed could be lawfully imposed. Finally, because nine of the members of the Eleventh Circuit have sat in Jefferson County within the last five years, and hence would be liable for the tax for their time spent there, the court

also addressed recusal and unanimously concluded that all of the judges could properly sit on this appeal. *Id.* at 74-81.

Jefferson County was not ready to quit. It filed a petition with this Court (No. 96-896) seeking review on the merits. At the invitation of the Court, the Solicitor General filed a brief (*id.* at 176-96), which urged the Court to grant review because the decision below was incorrect and it was in conflict with a decision of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985), a case that the Eleventh Circuit majority had distinguished because of significant differences in the two ordinances. Pet. App. 56 n.19. The Solicitor General also suggested that the basis for removal under section 1442(a)(3) was unclear -- an issue raised neither by petitioner nor any of the thirteen judges who had considered the case -- and suggested that the Court might wish to have that issue briefed if review were granted. The Solicitor General did not suggest that statutes such as Ordinance 1120 were common or even that any other place besides Alabama had one remotely like this one.

On June 9, 1997, this Court granted review and summarily vacated and remanded the case for further consideration in light of *Arkansas v. Farm Credit Services*, 117 S.Ct. 1776 (1997), which had been handed down the previous week. At issue in *Farm Credit Services* was the applicability of the Tax Injunction Act in an action in which a government-created corporation had sued in federal court to invalidate a state tax, but in which the United States was not a party. This Court found the Tax Injunction Act was a bar in those circumstances, and its remand order in this case suggested that it might also be a bar here, although petitioner had not raised that Act in either the court of appeals or in its submissions in this Court.

The Eleventh Circuit dutifully reconvened en banc, and in another carefully considered and detailed opinion for the

majority, Judge Cox held that the Tax Injunction Act was inapplicable. Although rejecting the argument that the removal provision that conferred federal jurisdiction was alone sufficient to overcome the Act, it read the provision as evidence of congressional intent that officers of the United States, raising federal defenses tied to their positions as federal officers, should be able to litigate them in federal court, even where the collection of state taxes was at stake, just as the United States could do in a similar situation. Pet. App. 21. As the court put it, "refusing to apply the exception in this case [because the Attorney General had not sided with the judges] would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive." *Id.* at 22.

The same three dissenters from the prior en banc decision also dissented on remand, this time joined by Judge Carnes who, after reading the brief of the United States filed in this Court, changed his mind on the merits. *Id.* at 24. All of the dissenters except Judge Anderson would also have reversed under the Tax Injunction Act, but none of them agreed with the Solicitor General that there was any problem with the original removal under section 1442(a)(3).

REASONS FOR DENYING THE WRIT

The principal reason why certiorari should be denied is that this case is truly unique; neither of the questions presented has previously arisen in this context, nor is there any reasonable likelihood that either will arise again if review is denied. So far as anyone has been able to determine, only three cities in the state of Alabama have laws like Ordinance 1120, and no other city, county, or state has a licensing provision like Ordinance 1120. Now that the constitutional issue has been resolved in the Eleventh Circuit, that not only ends the merits inquiry, but effectively precludes the procedural issues from arising in the

future in a similar context.

Nor does the petition suggest otherwise. With the exception of the ordinance involved in the *City of Pittsburgh* case discussed below, it points to no laws that would be affected by the merits, and it does not even suggest that the Tax Injunction Act issue has arisen in a context like this one. Nor does the petition attempt to offer reasons for granting review other than to correct what it asserts to be erroneous rulings, as evidenced by the heading on page 12 of the petition: "**ARGUMENT ON THE MERITS**." Indeed, even the *amicus* brief submitted by the United States on the prior petition did not suggest that there was any reason for granting the petition other than the fact that the decision below was incorrect. Thus, even if Eleventh Circuit were mistaken (which it is not), this case would not satisfy the requirements of this Court's Rule 10.

A. The Tax Injunction Issue.

To the best of our information, the applicability of the Tax Injunction Act, 28 U.S.C. § 1341, has never previously been considered by any federal court in a situation like this. Unlike every other case of which we are aware, this case did not begin with a taxpayer suing the taxing authority, but the other way around. Petitioner filed suit in small claims court in Alabama, under state law, against respondents who, because they are federal judges, were entitled to remove their cases to federal court under 28 U.S.C. § 1442(a)(3). These cases were not originally, and are not now, actions to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax" as that phrase is used in section 1341. To the contrary, this is a suit by a taxing authority to collect a tax in which the courts have upheld the claims of the taxpayers against the petitioner Jefferson County. In the nearly 50 years that the Tax Injunction Act has been the law, there is no reported case like this one, let alone one decided by this Court or a court of appeals.

There is a good reason why no such case has arisen and why none is likely to arise in the future: apart from the barriers created by the Tax Injunction Act, it would be almost impossible for a suit like this to be removed to federal court because, where the federal issue is a defense to a claim, not the claim itself, there is no "arising under" jurisdiction under 28 U.S.C. § 1331. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). It is only because of the status of respondents as federal officers, and because their defense is based on the fact that the petitioner is seeking to impose a tax because of their official conduct in office (carrying on the business of being a federal judge), that this case is removable under section 1442(a)(3).

Finally, as the well-reasoned opinion of the court of appeals on remand recognized, the existence of this narrow removal provision evinces Congress' intent to assure that federal officers can have access to the federal courts to have the validity of federal defenses relating to the performance of their official duties adjudicated in the federal rather than in the state courts. It is this "other side of federal balance" that this Court also recognized in *Farm Credit Services*, *supra*, 117 S.Ct. at 1780, which tips the scales in favor of an implied exception to the Tax Injunction Act here, but not in *Farm Credit Services*. In respondent's view, the majority below was entirely correct on this issue, but even it were not, this "once in a blue moon" application of the Tax Injunction Act is so unlikely to occur outside of Alabama, let alone the Eleventh Circuit, as to make this issue entirely uncertworthy.[1]

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[1] Although not raised in the questions presented, the petition suggests (at 11, 25) that the cases were not properly removable under 28 U.S.C. § 1442(a)(3). We doubt that the issue is fairly

(continued...)

B. The Merits Issue.

The petition points to no statutes outside of Alabama which seek to impose licensing requirements on federal judges or any other federal officials. Its main focus is on what it perceives to be errors in the majority's approach, not on the importance of this Court's reviewing this case to anyone other than the immediate litigants, and perhaps the other eleven authorized federal judges in Alabama. *See* 28 U.S.C. § 133.

Thus, the petition admits, even proclaims (at 12), that "This is a case of FIRST IMPRESSION," a view shared by the Eleventh Circuit: "The parties have not cited, and we have not found, any federal case addressing whether the intergovernmental tax immunity doctrine prohibits a state or local government from imposing a privilege tax on Article III judges." Pet. App. 37. According to petitioner, this Court should nonetheless grant review because the court of appeals "misfocused" its attention on the wrong issue; it made an "unsupported construction" of two federal statutes; and it "ignored" another statute and an Executive Order. Petition at 13. "Moreover," argues the petition, "the court of appeals refused to follow several decisions of this Court which establish the tests to determine" the proper outcome in this case. *Id.* at 13-14.

Making an error of law is not, except in the most unusual of circumstances, a reason to grant review under Rule 10. To

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(...continued)

comprised in the questions that are presented, but it too is unlikely to recur. Moreover, not one of the twelve judges who heard the case on remand agreed with petitioner or saw any merit with the position taken by the Solicitor General in his *amicus* brief to this Court, which was attached as an appendix to petitioner's brief on remand.

be sure, the cases cited by petitioner, all of which were discussed by the majority, bear on the issue, but none of them involves facts remotely like this case and hence resolved a legal issue like the one decided here. For example, in *Howard v. Commissioner of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953), there was no licensing of federal officials, let alone federal judges, and its principal focus was on the Buck Act, which prohibits federal employees from objecting to income taxes on the basis that the money was earned while on federal property, a claim never made here.[2]

The other cases relied on by petitioner are equally inapposite. Thus, in *Department of Employment v. United States*, 385 U.S. 355 (1966), the Court ruled that Congress had not waived the exemption for unemployment compensation taxes enjoyed by employees of the Red Cross, and in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), the Court found no exemption from what was admittedly a garden variety income tax for employees of an instrumentality of the federal government. Moreover, in *United States v. New Mexico*, 455 U.S. 720 (1982), the Court held that private contractors working for agencies of the United States were not immune from certain taxes on the sales of goods and services which they acquired in connection with their work for those agencies. There is, to be sure, analysis and language in those decisions that bears on this situation, but their facts are so different from this case that there are no "conflicts with relevant decisions of

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[2] The broad definition of income tax in 4 U.S.C. § 110(c), which includes taxes that are "measured by . . . gross receipts," is limited to "sections 105-109 of this title." The Buck Act, which is section 106, is thus covered, but the Public Salary Tax Act, which is in section 111, and on which the petition places principal reliance, is not. *See* Pet. App. 119-121.

this Court" of the kind that this Court has found in granting review pursuant to Rule 10(c). Moreover, under Rule 10, the case must involve "an important federal question," not one like this that has never arisen before and is highly unlikely to be repeated in the future.

Finally, in footnote 9 on page 20, petitioner asserts that the decision below "*directly conflicts* with the holding of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985)" (emphasis in petition). Once again, although the ordinances at issue in both cases impose taxes that are borne by a person employed by the federal judiciary, the similarities end there. In *Pittsburgh*, the law required court reporters (and all others doing business in the City) to pay a tax based on their sales, which included transcripts sold to private parties, but not the reporter's federal salary. Unlike this case, there was no attempt to license a federal function, let alone an attempt to do so to a federal judge based on his salary. Contrary to petitioner's beliefs, the decision below does not threaten to remove the power to impose income taxes on federal judges; it simply stops localities from attempting to make federal judges pay for the privilege of carrying out their Article III duties.[3]

There are two other reasons why this Court should decline review. Even if this Court were to agree with petitioner on either or both of these questions presented, this litigation would not be over. Either the case would be remanded to state court, where it would begin again, or, if the Court found for

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[3] *See also Cook v. Commissioners of Sinking Fund of City of Louisville*, 312 Ky. 1, 226 S.W.2d 328 (1950) (ordinance similar to Pittsburgh's and distinguishable from Jefferson County's because *inter alia*, (1) the fee was an across-the-board tax, with no exemptions for those already licensed by the state, and (2) the failure to obtain a license was not "unlawful").

petitioner on the merits, the court of appeals (presumably en banc) would have to consider respondents' Article III compensation diminishment claims. Second, a certified class action in the Alabama state courts, which includes classes of both federal and non-federal workers, and which challenges Ordinance 1120 on grounds other than those raised here, was tried last fall and a decision is expected shortly. *Richards v. Jefferson County*, Circuit Court of Jefferson County, Case No. CV-92-3191, Order Certifying Class dated May 14, 1997, on remand from *Richards v. Jefferson County*, 116 S.Ct. 1761 (1996) (reversing dismissal based on improper reliance on res judicata). If plaintiffs in *Richards* prevail, Ordinance 1120 will become a dead letter even if petitioner were to prevail on every issue in this case.

* * *

We end where we began. Ordinance 1120 is a unique creature, found in only three other places in Alabama and nowhere else. As such, the decision below will have an impact on only those four locations and only if they seek to license federal judges. Indeed, the uniqueness of Ordinance 1120 is also responsible for the novel way in which the Tax Injunction Act arises. This case has already received full review by a district judge, a court of appeals panel, and two en banc sittings of twelve circuit judges; Jefferson County has had far more process than it is due in its efforts to collect a few hundred dollars a year from federal judges. Enough is enough.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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